



Information Commissioner's Office

The Information Commissioner's response to the Ministry of Justice's consultation on "How should the UK approach the EU proposal to create a European Account Preservation Order?"

Introduction

The Information Commissioner has responsibility in the UK for promoting and enforcing the Data Protection Act 1998 (DPA) and the Freedom of Information Act 2000. The Information Commissioner's Office (ICO) is the UK's independent authority set up to uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals. The Commissioner does this by providing guidance to individuals and organisations, solving problems where he can, and taking appropriate action where the law is broken. The Commissioner's response to this consultation is primarily based on the practical experience he has gained in regulating compliance with the DPA.

The Commissioner welcomes the comment on the Ministry of Justice's consultation on "How should the UK approach the EU proposal to create a European Asset Preservation Order?" in response to the European Commission's proposals on an EU Regulation creating a European Account Preservation Order to facilitate cross-border debt recovery on civil and commercial matters.

Below are some suggestions regarding the proposals for sharing/exchanging of information between financial institutions and law enforcement and/or judicial authorities across Member States. The Information Commissioner's overarching views that should be taken into account when considering the proposals are those typically experienced more generally in debt recovery, including:

1. Adequate care should be taken to ensure sure that the debt exists and is not disputed; and
2. The EAPO is enforced on the right person.

Firstly, the Information Commissioner would like to ensure that care is taken to make certain that the debt is genuine and not in dispute. This has to be the case as the first data principle states that personal data

may only be processed when it is 'fair' to do so. It may be the case that a consumer has not paid their lender for good reason - perhaps because of the supply of a faulty product or unfinished work.

It is hoped that the Information Commissioner is correct in his assumption that given the EAPO is recovery action, that steps would be taken prior to the order being processed that the claimant clearly demonstrates that there is a genuine debt to be recovered, for example, lodging a claim for repayment of a debt in the County or High Court in the UK (depending on its value). A defendant would have to be served with a notice that a claimant is making a claim against them and the Court would then need to make a ruling in the claimant's favour that a genuine debt exists prior to any enforcement of the allegation.

The Information Commissioner would also hope that such a tool is not being used to share information of this nature for debt recovery of notoriously disputed fines such as parking tickets and speeding fines and strongly urges caution against this.

Secondly, the Information Commissioner urges that every care must be taken to make sure that the EAPO is enforced against the right person given the potential significant detriment suffered by an innocent party if a mistake were to be made. Significant thought should be given before ordering/using an EAPO as the most appropriate method of enforcement.

The Information Commissioner understands that in order to identify the correct person the claimant, or competent authority, may want to access a publically available register, such as the register of directors held by Companies House.

The Information Commissioner fully appreciates why it is necessary to withhold the fact that an EAPO is being processed as debtors could shift their funds to another account if they were to become aware of such a fact. Therefore every step should be taken by financial institutions/lenders to be as clear, open and transparent about the potential use of EAPOs if customers are alleged not to have paid their debts across the EU in commercial and civil matters. Lenders should check and ensure that their privacy notices adequately cover how customer data may be processed for debt collection purposes in order to comply with Principle 1 of the Data Protection Act, which states:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—
(a) at least one of the conditions in Schedule 2 is met, and (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

The Information Commissioner is keen to ensure that as transparent and fair system is in place regardless of the processing operation, so individuals can make a specific, informed and free decision.

Therefore, under the Data Protection Act, the Information Commissioner would understand that the condition for processing in this instance would be legitimate interests of lenders.

Finally, it is understood that the flow of data on the defendant would mean that the claimant supplies the known bank details of the defendant and then may apply to a member states' relevant authority for further data unknown to them. The relevant authority would then serve the EAPO on the defendant's bank. If this understanding is correct, the Information Commissioner welcomes the fact that this appears to be in line with the minimisation principle, as no further details about the defendant's bank account would be disclosed to the claimant.

The Information Commissioner hopes that the above response to the consultation is helpful to the Ministry of Justice in helping achieve its objectives. In the meantime if any further clarification on any of the above points is needed, please do not hesitate to contact this office.

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